BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DIANE L. ANDRADE Claimant VS. EXCEL CORPORATION Respondent Self-Insured AND KANSAS WORKERS COMPENSATION FUND	)	Docket No. 183,489

ORDER

Respondent requested review of the Award entered by Special Administrative Law Judge Douglas F. Martin dated March 5, 1996. The Appeals Board heard oral argument on July 25, 1996.

APPEARANCES

Claimant appeared by her attorney, Chris A. Clements of Wichita, Kansas. The respondent, a qualified self-insured, appeared by its attorney, D. Shane Bangerter of Dodge City, Kansas. The Workers Compensation Fund appeared by its attorney, Randall D. Grisell for Mark McFarland of Garden City, Kansas.

RECORD AND STIPULATIONS

The record reviewed by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Special Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 56 percent work disability. Respondent requested the Appeals Board to review the issue of nature and extent of disability. Specifically, respondent asks whether claimant should be limited to her functional impairment rating if it is shown claimant refused accommodated work. During oral argument, the Kansas Workers Compensation Fund (hereinafter Fund) raised the issue of its liability. Those are the two issues now before the Appeals Board for review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the briefs and arguments of the parties, the Appeals Board finds that the Award of the Special Administrative Law Judge should be modified in part and reversed in part.

On the issue of nature and extent of claimant's disability, the Appeals Board finds that the permanent partial disability award by the Special Administrative Law Judge should be modified to find a 69 percent work disability. The Appeals Board otherwise adopts the findings, conclusions, and analysis of the Special Administrative Law Judge to the extent they are not inconsistent with the findings and conclusions enumerated herein. The Appeals Board specifically finds that claimant did not refuse to perform the accommodated work provided by respondent. Therefore, claimant's permanent partial disability benefits should not be limited to her functional impairment rating only. The rationale of the Kansas Court of Appeals in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), is not applicable to the facts in this case.

The principal questions, with regard to the nature and extent of claimant's disability, are whether the work respondent provided to claimant before her termination fully accommodated claimant's work restrictions and limitations and, if so, whether claimant unreasonably refused to perform such accommodated work. The record reflects respondent offered claimant three separate accommodated positions. The first involved making boxes. This job did not accommodate claimant's restrictions regarding working above shoulder level with her upper extremities and did not accommodate her restriction against working in a cold environment. When this was pointed out to respondent by claimant another job was offered. This involved working on what was known as the Japanese machine. Claimant worked on this job two days. When asked whether the job was causing her problems, she informed respondent that it was. Respondent, therefore, moved claimant to another job stamping meat. Claimant performed this job for five days. During this time she complained to the company nurse about pain in her neck and shoulders. She was treated with a heating pad and returned to work. When she was unable to keep up with the speed and repetitive nature of the job respondent and claimant together determined that adequate accommodations could not be made and claimant was terminated.

The Appeals Board differs with the findings of the Special Administrative Law Judge in that we find the Japanese machine job was within the restrictions recommended by both Dr. Pedro A. Murati and Dr. Ernest R. Schlachter. Also, the meat stamping job was within the restrictions of Dr. Murati. The Appeals Board, therefore, does not base its decision to award work disability upon a finding that respondent did not accommodate claimant's restrictions. Instead, instead the Appeals Board finds that despite respondent's good-faith efforts to accommodate claimant, claimant was unable to perform the job to respondent's satisfaction. Claimant did not ask to be removed from the Japanese machine job. She merely responded truthfully when asked if it was bothering her. Respondent decided to have claimant attempt a different position, that being the 86K or meat stamping job. Although the meat stamping job was within the restrictions recommended by Dr. Murati, it exceeded the repetitive use of the upper extremities restriction of Dr. Schlachter. Furthermore, claimant reported that it caused her pain. Claimant did not ask to be removed from the meat stamping job. Rather, respondent determined that she was not able to perform the job satisfactorily. Respondent asked claimant what further accommodations could be made and claimant was unable to identify any job within the respondent's meat processing operation which she felt she was physically able to perform. Accordingly, she was terminated. Claimant did not offer nor was she asked to return to the Japanese machine job. Claimant did not offer nor was she asked to return to the meat stamping job. Claimant did not refuse to perform either job. Neither does the Appeals Board find that claimant failed to put forth a good-faith effort to perform those tasks. Following her termination from employment with the respondent, claimant obtained other employment.

Claimant's right to permanent partial disability benefits is governed by K.S.A. 44-510e which provides in pertinent part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

Respondent contends that claimant refused to perform accommodated work provided by the respondent which could have been performed without violating her restrictions. It is argued that because she would have earned a comparable wage, the rationale of Foulk, supra, is applicable. Although Foulk dealt with work disability under the former version of K.S.A. 44-510e, the Appeals Board has previously held its rationale to be applicable for injuries occurring after July 1, 1993. In Foulk, the Court of Appeals said:

> "Construing K.S.A. 1988 Supp. 44-510e(a) to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage would be unreasonable where the proffered job is within the worker's ability and the worker had refused to even attempt the job. The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system." (Syl.¶ 4.)

Because claimant is not engaging in work equal to 90 percent or more of the wage she was earning at the time of her injury, and because the rationale of Foulk is inapplicable to the factual situation in this case, the Appeals Board finds claimant is entitled to receive permanent partial disability benefits based upon the average of her percentage loss in her ability to perform the work tasks she performed during the 15-year period preceding the accident and the percentage difference between the average weekly wage she was earning at the time of her injury and the average weekly wage she is earning after the injury. As the Special Administrative Law Judge points out in his Award, claimant's pre-injury average weekly wage when compared to her post-injury earnings reveals a 56 percent wage loss. Also, the only testimony in the record of the extent to which claimant has lost the ability to perform work tasks expressed in the opinion of a physician, is the 82 percent loss figure given by Dr. Schlachter. The Special Administrative Law Judge chose not to follow Dr. Schlachter's opinion finding it to be "overly pessimistic" about the extent of claimant's loss of task performing abilities. Although the Special Administrative Law Judge found Dr. Murati's testimony to be untrustworthy in certain respects, he relied upon Dr. Murati to find evidence that claimant had not lost 82 percent of her task performing abilities. When viewing the evidence taken as a whole, the Special Administrative Law Judge concluded that claimant's task loss was 56 percent. The Appeals Board agrees that had Dr. Murati been asked for his opinion concerning claimant's task loss, his percentage would likely have been less than that of Dr. Schlachter. This has been borne out in part by his difference of opinion with Dr. Schlachter as to what jobs claimant could or could not perform for respondent, as well as the differences in their respective restriction recommendations. Nevertheless, for whatever reason, Dr. Murati was not asked for an opinion as to claimant's loss of task performing ability. The only opinion in the record is that of Dr. Schlachter. We find Dr. Schlachter's opinion to be accurate and appropriate and accept same as the claimant's loss. Averaging the 82 percent loss of task performing ability with 56 percent wage loss results in a work disability of 69 percent. Therefore,

claimant is entitled to a permanent partial disability award based upon a 69 percent work disability.

The next issue to be addressed is Fund liability. The Special Administrative Law Judge found the Fund liable for 50 percent of claimant's award. The Appeals Board does not disagree with the analysis by the Special Administrative Law Judge with regard to this apportionment. However, the Appeals Board does not find sufficient evidence in the record to carry respondent's burden of proving that it knowingly retained a handicapped employee. Respondent's case against the Fund relies upon its theory that claimant's bilateral upper extremity injuries developed first with regard to the left upper extremity and then developed on the right, due to claimant's overcompensation use of the right upper extremity for the injury to the left. Claimant is left-hand dominant. While claimant's testimony and that of Dr. Schlachter lend support to this theory, the evidence does not establish that respondent had knowledge of a handicap with respect to claimant's left side before the right side conditions developed. First of all, claimant's 1985 left upper extremity complaints are too far removed from the stipulated September 21, 1993 date of accident to be material to this case. Also, those symptoms did not rise to the level of being a handicap within the meaning of the statute. Secondly, by the time claimant reported her symptoms to the company nurse in September 1993, she reported bilateral upper extremity complaints. Respondent's Exhibit 1 to the evidentiary deposition of George Parish contains an Excel Corporation Employee Statement of Injury dated September 21, 1993. This exhibit bears the signature of the claimant and was represented to be a part of her personnel file by Mr. Parish who works with the Workers Compensation Office at Excel Corporation. The form asks, "What part of the body did you injure?" A series of body parts are listed with boxes to be checked beside each. It shows injury to claimant's neck, right and left wrists, right and left hands and her right and left shoulders. Furthermore, the form thereafter asks, "Was the injury to your right or left part of body named above?" In answer to this question is the handwritten response "both sides more left then [sic] right". The Appeals Board finds that by the time respondent became aware of claimant's injury, her complaints were to both her left and right upper extremities, including both shoulders. Therefore, respondent has not shown that it "knowingly" employed or retained a handicapped employee as required by K.S.A. 44-567(a). Therefore, the respondent cannot be relieved of liability for compensation awarded claimant herein. The Award of the Special Administrative Law Judge finding the Fund liable for 50 percent of claimant's injuries is reversed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge Douglas F. Martin dated March 5, 1996, should be, and hereby is, modified in part and reversed in part as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Diane L. Andrade, and against the respondent, Excel Corporation, a qualified self-insured, for an accidental injury which occurred September 21, 1993 and based upon an average weekly wage of $453.45, for 11.14 weeks of temporary total disability compensation at the rate of $302.32 per week or $3,367.84, followed by 286.35 weeks at the rate of $302.32 per week or $ 86,569.33 for a 69% permanent partial general disability, making a total award of $89,937.17.

As of August 5, 1996, there is due and owing claimant 11.14 weeks of temporary total disability compensation at the rate of $302.32 per week or $3,367.84, followed by 138.72 weeks of permanent partial disability compensation at the rate of $302.32 per week in the sum of $41,937.83, for a total of $45,305.67 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $44,631.50 is to be paid for 147.63 weeks at the rate of $302.32 per week, until fully paid or further order of the Director.

The Kansas Workers Compensation Fund shall bear no liability for any portion of this Award.

Fees necessary to defray the expense of administration of the Workers Compensation Act are hereby assessed against the respondent as follows:

Underwood & Shane	
Deposition of Diane L. Andrade	$413.00
Deposition of George Parish	$183.75
Deposition of Jim Maher	$158.50
Barber and Associates	
Deposition of Pedro A. Murati, M.D.	Unknown
Don K. Smith & Associates	
Deposition of Ernest R. Schlachter, M.D.	$215.50
Special Administrative Law Judge	$150.00

IT IS SO ORDERED.

Dated this ____ day of August, 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Wichita, KS
D. Shane Bangerter, Dodge City, KS
Mark E. McFarland, Garden City, KS
Douglas F. Martin, Special Administrative Law Judge
Philip S. Harness, Director